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Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

DR. MASSOOD JALLALI,

Petitioner,

vs.

NOVA SOUTHEASTERN UNIVERSITY, INC.,

Respondent.

On Writ of Certiorari to the
District Court of Appeal
Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE APPELLATE COURT MISAPPLIED FLORIDA'S PRECEDENT DECISION IN *JOHN B. STETSON* v. *HUNT*, 102 So. 637 (1924), WHICH SHOULD BE REVIEWED TO REFLECT HOW THE MODERN COLLEGE UNIVERSITY OPERATES?

II. WHETHER THE APPELLATE OPINION CREATES SUBSTANTIAL CONFLICT WITH THE THIRD DISTRICT COURT'S OPINION IN *SHARICK v. SE. UNIV. OF THE HEALTH SCIENCES, INC.*, 780 So.2d 136 (Fla. 3rd DCA 2000), WHICH SHOULD BE RESOLVED TO ESTABLISH A UNIFORM STANDARD IN FLORIDA?

III. WHETHER THE APPELLATE COURT'S VACATUR OF THE JURY'S VERDICT ENCROACHED UPON THE JURY'S RIGHT TO DECIDE A QUESTION OF FACT, THUS RESULTING IN CONFLICT WITH THE THIRD DISTRICT'S OPINION IN *DOS SANTOS v. AJAX NAV. CORP.*, 531 So.2d 231 (Fla. 3rd DCA 1988)?

CERTIFICATE OF INTERESTED PERSONS

There are no other persons having an interest in this case other than those listed in the caption of the case.

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PETITION

DR. MASSOOD JALLALI respectfully petitions the Supreme Court of the United States for a Writ of Certiorari.

OPINION BELOW

The decision of the Fourth District Court of Appeals, which vacated the $819,000 verdict issued in favor of Petitioner, is contained in "Appendix A". The order denying rehearing and certification of the Fourth District Court of Appeals is contained in "Appendix B". The order denying discretionary review of the Florida Supreme Court is contained in "Appendix C".

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the Florida Supreme Court was entered on April 1, 2009. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND FACTS

A. Preliminary Statement

Dr. Massood Jallali will be referred to by name and title or as "Petitioner" throughout this brief. Nova Southeastern University will be referred to as "Nova", "NSU" or as "Respondent" throughout this brief. Record references are cited to the Record on Appeal (Fourth District).

B. Factual Background

In August 1998, Dr. Massood Jallali enrolled as a first-year medical student in the School of Osteopathic Medicine at Nova Southeastern University. (R.2200-2204). Dr. Jallali already held a medical degree and was practicing as a Podiatrist in Broward County,

Florida. He remained matriculated at the University for a period of five (5) years, during which time he completed all of the requirements for a degree in osteopathic medicine at Nova. (R.2200-2204).

In 2005, when Dr. Jallali applied to the University for his degree, University officials informed him that he would not receive the degree unless he *passed* "Level II" of the "Complex Exam". (R.2200-2204). In 2006, after unsuccessfully appealing the University's determination, the University discharged Dr. Jallali from the program, and refused to issue him a degree.

Dr. Jallali brought suit against Nova for, among other things, breach of an implied-in-fact contract. The basis of the contract, Dr. Jallali maintained, was derived from the special relationship that existed between himself and the University (*i.e.*, as between a school and a degree-seeking student), and more specifically, could be found in the "terms" of the Official 1998 Student Catalog, distributed by the University's Health Provision Division (hereafter as "Catalog").

Dr. Jallali's suit maintained that both he and the University were bound by the degree requirements set out in the *1998 Catalog* that he and his fellow classmates received upon entering the program, and that Catalog did *not* contain any requirement that he pass this particular exam. The record later established that none of his fellow classmates were subjected to this "new rule."[1] Thus, Dr. Jallali claimed

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[1]The requirements were *selectively* imposed upon Dr. Jallali. His classmates in 1998 were not subjected to this additional

that as a result of the University's breach of contract, he had incurred damages, which included *future* damages– all as a *direct result* of not receiving the *degree* which Dr. Jallali contends that he earned and to which he was entitled.

Just prior to trial, the trial court struck part of Dr. Jallali's damage claim that sought recovery of his future lost earnings and profits. (R.2189). The trial court also excluded Dr. Jallali's expert's opinion as to those damages and indicated that no further evidence of future damages could be presented to the jury on that issue. (R.2189); (R.2185-86).

The case proceeded to a four-day jury trial before the Honorable Eli Breger, Senior Judge. The jury determined that Nova had, in fact, breached its contract with Dr. Jallali, and that its acts in attempting to change the requirements after-the-fact were in fact, "arbitrary and capricious," and returned a verdict in Dr. Jallali's favor in the amount of $819,000. In light of the verdict, Dr. Jallali moved the trial court to reconsider the issue of future lost earnings/damages. (R.2210-2217). The trial court denied reconsideration. (R.2018). The University filed a motion for directed verdict, which the trial court

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requirement. It is fundamental error to hold that he was in the Class of 1999 when he initially enrolled, matriculated and received credit for a number of classes in 1998. He should not have been considered in the Class of 1999. These are jury questions as to whether Nova acted arbitrary and capricious in treating Dr. Jallali as if he was in the class of 1999 and subjecting him to the additional requirements, when none of his classmates in 1998 were subjected to the additional requirements.

also denied.

Final Judgment issued on May 23, 2007 (R.2263). Dr. Jallali appealed the trial court's limitation of damages. Nova cross-appealed the trial court's denial of its motion for a directed verdict.

On October 1, 2008, the Fourth District vacated the $819,000 verdict, reversed the judgment of the trial court, and held "that the circuit court erred in denying Nova's motion for directed verdict." The court decided "not to reach the evidentiary issue raised on [Dr.] Jallali's appeal", contending that "[t]he central issue on appeal is whether the circuit court should have granted Nova's motion for directed verdict." Dr. Jallali sought rehearing and for certification of the following issue:

> Whether judicial review of all decisions made by Universities with regard to their students should under all circumstances be restricted to the "arbitrary and capricious" standard set out in *John B. Stetson v. Hunt*, 102 So. 637 (Fla. 1924)?

Dr. Jallali moved for rehearing and certification. On October 27, 2008, the appellate court denied rehearing and certification. Dr. Jallali timely moved the Florida Supreme Court for discretionary review. On April 1, 2009, the Florida Supreme Court declined to accept review of the appellate court decision. This timely petition for certiorari review follows.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT MISAPPLIED FLORIDA'S PRECEDENT DECISION IN *JOHN B. STETSON* v. *HUNT*, 102 So. 637 (1924), WHICH SHOULD BE REVIEWED TO REFLECT HOW THE MODERN COLLEGE UNIVERSITY OPERATES.

The modern college university operates different than the establishment of the 1920's. What worked then, may not always work now. Digital technology, online programs and curriculum advances are areas that ancient decisions are ill equipped to govern. Dr. Jallali's case illustrates this logic. It is time to update the law in this area to make it work in harmony with the way the modern university operates.

In rejecting Dr. Jallali's contention that different standards may need to be considered relating to University decisions, academic vis-à-vis disciplinary, the Fourth District misapplied *Hunt*. The panel initially stated that the arbitrary and capricious standard was created by the Florida Supreme Court in 1924:

> "[t]he rule we apply in this case has its genesis in the Supreme Court's 1924 decision in *John B. Stetson Univ.*, a case we do not have the authority to overrule [citing to *Hoffman* v. *Jones*]."

Slip Opinion, pg. 8. Conversely, *Hunt* did not create the "arbitrary and capricious" standard. In *Hunt*, a graduate student brought an action for injunctive relief and damages to compel an Institution to grant her a graduate degree despite being expelled from the school for disciplinary reasons. The holding related to a private Institution's right to enforce its own standards of conduct.

Hunt explained the Institution was upholding its own disciplinary rules, and there was no issue as to whether there was a modification in those rules or whether the modification was applied to only one person in the class. At that time, the Florida Supreme Court held that the test for review was whether the disciplinary decision was made with "malice" --this is not the standard utilized by courts today. Interestingly, if the Court in *Hunt* applied today's test of whether the University acted "arbitrary and capricious", the result might have been different. In *Hunt* there was no question that the student violated the disciplinary code; the issue simply turned on the Institution's authority to enforce one of the terms of the implied agreement.

Hunt is one of the earliest cases involving an Institution's greater right to make *disciplinary* decisions, yet *Hunt* does **not** stand for the proposition that the University may exercise *academic* discretion by **applying a modification** from a later Student Handbook **to only one person in the class**. Dr. Jallali suggested on appeal that there are situations that do not involve the traditional academic performance issues --as the issue here, where Dr. Jallali satisfied all requirements set forth in his

matriculation date Handbook. Dr Jallali argued that there are strong policy reasons to consider whether there should be a different standard for cases that do not involve an Institution's disciplinary decisions.

In point of fact, this case is not any about any "academic judgment" or "evaluation of performance" made by the School. It is about the University being *required by law* to follow (within reasonable limits, of course) the simple terms and conditions it set out in its School Handbook (and implied-in-fact contract) with its students. Dr. Jallali raised several arguments about the *context* in which the rule in *Hunt* should be utilized (*i.e.*, only in reviewing *purely academic* decisions) and questioned why that standard should still be applied in the *modern* era - when universities are not anything like what they were in 1920's Florida. He did not ask that he, as an individual, be "excused" from the application of that standard; he simply took the position that *Hunt* and its progeny were *never* meant to apply to *all* university decisions; and that if so, that antiquated law should be reviewed.

The Fourth District's decision essentially reaffirmed an 80-year-old outdated precedent, which will undoubtedly have substantial impact on future decisions in Florida and in perhaps other courts all over the country. The opinion essentially grants modern educational institutions *carte blanche* to deal with students however they wish --despite students paying tens of thousands of dollars to attend-- and virtually cuts off all access to the Court system for students who contend they have been treated in an

arbitrary or capricious manner by their University.

II. THE APPELLATE OPINION CREATES SUBSTANTIAL CONFLICT WITH THE THIRD DISTRICT COURT'S OPINION IN *SHARICK v. SE. UNIV. OF THE HEALTH SCIENCES, INC.*, 780 So.2d 136 (Fla. 3rd DCA 2000), WHICH SHOULD BE RESOLVED TO ESTABLISH A UNIFORM STANDARD IN FLORIDA.

In *Sharick*, the Third District held that: "...terms and conditions for graduation are those offered by the publications of the college **at the time of enrollment**... they have some of the characteristics of a contract between the parties, and are sometimes subject to civil remedies in courts of law." *Id.*, 780 So.2d at 138) (bold added). See also *University of Miami v. Militana*, 184 So.2d 701, 704 (Fla. 3rd DCA 1966).

The relationship, as *Sharick* explained, between student and university is unique:

> "The service rendered is the provision of an educational experience designed to lead to a college degree." *Gross v. Family Serv. Agency, Inc.*, 716 So.2d 337, 339 (Fla. 4th DCA 1998)...*approved sub nom. Nova Southeastern Univ. v. Gross*, 758 So.2d 86 (Fla. 2000). "When a student is duly admitted by a private university ...there is an implied contract between the student and the university that,

> if [the student] complies with the terms prescribed by the university, [the student] will obtain degree." *Harwood v. Johns Hopkins Univ.*, 747 A.2d 205, 209 (Md. Ct. Spec. App. 2000); see also *Alden v. Georgetown Univ.*, 734 A.2d 1103, 1111 n.11 (D.C. 1999); *Bilut v. Northwestern Univ.*, 645 N.E.2d 536, 542 (Ill. App. Ct. 1994) ("The foundation of [the relationships between educational institutions, their students, and faculty] is the understanding that the students will abide by and adhere to the disciplinary regulations and the academic standards established by the faculty and the university; and that upon the satisfactory completion of their studies, they will be awarded a degree in their chosen discipline."); *Carr v. St. John's Univ., N.Y.*, 231 N.Y.S.2d 410 (N.Y. App. Div.) ("The university cannot take the student's money, allow him to remain and waste his time in whole or in part (because the student might regard it as a waste of time if he does not obtain the degree), and then arbitrarily expel him or arbitrarily refuse, when he has completed the required courses, to confer on him that which it promised, namely, the degree"), *aff'd*, 235 NYS.2d 834 (N.Y. 1962).

Sharick addressed how to calculate damages for a breach of implied-in-fact education contract. *Sharick* explained that in Florida "[t]he purpose of compensation for a breach of contract is to place the injured party in the position he or she would have been in had the breach not occurred...[that] [d]amages recoverable by a party injured by a breach

of contract are those which would naturally result from the breach and can reasonably be said to have been contemplated by the parties at the time the contract was made." *Sharik*, 780 So.2d at 138 (citing *Douglass Fertilizers & Chem., Inc. v. McClung Landscaping, Inc.*, 459 So.2d 335, 336 (Fla. 5th DCA 1984)).

Sharick acknowledged the requirement for certainty of damages in a contract action, but also recognized several modifying doctrines to the certainty rule, which include:

- If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference.

- Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty.
- Mere difficulty in ascertaining the amount of damage is not fatal.

- Mathematical precision in fixing the exact amount is not required.

- If the best evidence of the damage of which the situation admits is furnished, this is sufficient. The plaintiff may recover the value of his contract, and this may be measured by the value of the expected profits.

- Profits may sometimes be proved as evidence of the damages, when they would not be directly recoverable.

Sharick, 780 So.2d at 138. The Court was also quick to mention that the Florida Supreme Court has determined that where there is a "yardstick" by which damages can be measured, they are allowed if proven." *Ibid.* (citing *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1350 (Fla. 1989) (internal citations omitted). Finally, the Court explained that the "uncertainty which defeats recovery in such cases" is the cause of the damage rather than the amount. "If from proximate estimates of witnesses a satisfactory conclusion can be reached, it is sufficient if there is such certainty as satisfies the mind of a prudent and impartial person." Accordingly, the Court held that,

> " . . . The party must prove that: 1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined. *Id.* at 1350-51 (emphasis added) (citations omitted); *R.A. Jones & Sons, Inc. v. Holman*, 470 So.2d 60, 69-70 (Fla. 3rd DCA 1985) ("Inability to give the exact or precise amount of damages does not preclude recovery so long as there is a reasonable basis in the evidence for the amount awarded")... ."

Sharick, 780 So.2d at 138 (bold added).

Damages include a delay in education measured as loss to one's capacity to earn. See *Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir. 1989) (upholding $25,000 damage award to nursing student wrongfully expelled by school which was equivalent to

lost salary for year in which her education was delayed); *rev'd on other grounds*, 499 U.S. 225 (1991), damages reinstated on remand, 938 F.2d 315 (1st Cir. 1991); *Fussell v. Louisiana Bus. College of Monroe, Inc.*, 519 So.2d 384, 387-88 (La. Ct. App. 1988).

In *Florida Greyhound Lines v. Jones*, 60 So.2d 396, 398 (1952), the court allowed a claim for the diminished future earning capacity of a housewife where there was no evidence of actual past earnings, because at some future time she may need to earn money and may not be able to work because of the injury sustained. Similarly, in *McElhaney v. Uebrich*, 699 So.2d 1033 (1997), the court supported a claim for loss of earning capacity for a plaintiff, despite the fact that she had worked unpaid for her husband's business, based upon her education and skills and what she could have earned in the open market. See also *Mullis v. Miami*, 60 So.2d 174 (1952). Finally, punitive damages are awardable in breach of contract claims when a proprietary school's breach of contract is attended by an intentional wrong amounting to an independent tort. Restatement (2nd) of Contracts §355 (1979) (punitive damages recoverable for breach of contract when conduct constituting breach is also a tort for which punitive damages are recoverable); *Associated Heavy Equip. Schs., Inc. v. Masiello*, 219 So.2d 465, 467 (Fla. Dist. Ct. App. 1969) (award of punitive damages where the defendant was fraudulently induced into a contractual agreement).

Dr. Jallali was not afforded damages as contemplated under *Sharick*. Although Dr. Jallali prevailed at trial and received an $819,000 verdict, the Fourth District vacated the verdict in favor of

Nova by granting Nova an "implicit" "right to change ...academic degree requirements", Slip Opinion, pg. 6, and permitted Nova to impose the 1999 Catalog requirements in the place of the *1998 Catalog* "offered...by the college at the time of enrollment." The Fourth District held that the terms and conditions for Dr. Jallali's graduation are instead to be determined by applying a standard applicable to the 1999 entering class (which directly conflicts with *Sharick*).[2] Dr. Jallali is treated differently from all other 1998 classmates, who graduated by sitting for (and not passing) "Level II" of the "Complex Exam". Treating Dr. Jallali differently is akin to discrimination.

III. THE APPELLATE COURT'S VACATUR OF THE JURY'S VERDICT ENCROACHED UPON THE JURY'S RIGHT TO DECIDE A QUESTION OF FACT, THUS RESULTING IN CONFLICT WITH THE THIRD DISTRICT'S OPINION IN *DOS SANTOS v. AJAX NAV. CORP.*, 531 So.2d 231 (Fla. 3rd DCA 1988).

The Fourth District went further to find that it could resolve the issue of whether the University's conduct was arbitrary or capricious. The court

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[2]The Fourth District also misapprehended application of *University of Mississippi Medical Center* v. *Hughes*, 765 So.2d 528 (Miss. 2000) and *Hammon* v. *Auburn Univ.*, 669 F.Supp. 1555 (M.D. Ala. 1987). Neither case finds that a University may apply a later School Handbook to a student that entered the class before that year.

characterized this finding as one of law. Conversely, whether or not the University's conduct was arbitrary or capricious, is a question of fact --not one of law. Despite the rule that the jury determines questions of fact, *Dos Santos v. Ajax. Nav. Corp.*, 531 So.2d 231 (Fla. 3rd DCA 1988), *cert. dismissed*, 489 U.S. 1048 (1989), the Fourth District held that the University did not act in a manner that was arbitrary, capricious or irrational. The jury should decide such issues at trial.

The Panel made its own factual decision, which apparently obviated the need for a jury. But it is not the role of an appellate court to usurp the functions of the jury. The Panel's own factual decision that the University did not apply the 1999-2000 modification arbitrarily or capriciously to Dr. Jallali misapprehends the law that courts should not substitute their own judgment for that of the jury. Perhaps even more compelling as it relates to Dr. Jallali, in the trial of this matter, there was a Special Verdict form that answered the specific question in the affirmative as to whether Nova's conduct was arbitrary and capricious.

Students, like Dr. Jallali, do not leave fundamental rights on the school doorsteps as they enter. When the appellate court substituted its judgment for that of the jury's verdict that Nova, in fact, acted arbitrary, Dr. Jallali's guaranteed fundamental right to trial by jury ceased to exist.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Fourth District and Dr. Jallali should be entitled to a *Sharick* damages trial on lost and future earnings.

Respectfully submitted,

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APPENDIX

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Appendix "A"

Appellate Opinion Vacating and
Reversing Judgment of Trial Court
(October 1, 2008)

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

July Term 2008

DR. MASSOOD JALLALI,

Appellant,

v.

NOVA SOUTHEASTERN UNIVERSITY, INC.,

Appellee.

No. 4D07-2351

[October 1, 2008]

GROSS, J.

Massood Jallali, a student in the Osteopathic Medical Program, sued Nova Southeastern University for breach of an implied contract. The suit alleged that Jallali had satisfied the terms and conditions for graduation from Nova's osteopathic program, but that the university refused to confer a degree upon him. Jallali sought reimbursement for $250,000 in tuition costs, lost earnings while in school of $836,869, and lost future earnings of $6,900,000. A jury returned a verdict for $819,000. On appeal, Jallali challenges a ruling excluding an expert witness as to lost future earnings and Nova cross appeals the trial court's denial of its motion for directed verdict. Because we hold that the circuit court erred in denying Nova's motion for directed verdict, we do not reach the evidentiary issue raised on Jallali's appeal.

Jallali matriculated at Nova in the 1998-99 academic year, with an expected graduation date of May 2002. Nova provided Jallali with a 1998-99 Student Handbook which set forth graduation requirements for the osteopathic program: two years of course work, two years of clinical rotations, passing the Comlex Level I exam, and taking the Comlex Level II exam. Although a student was not required to pass the Comlex Level II exam to obtain a degree, the student was required to sit for the exam within a "six year limit for completing all graduation requirements."

The 1998-99 Student Handbook, as well as all handbooks issued during Jallali's time at Nova, expressly reserved the school's right to amend, modify, add to, or delete its rules, policies, and procedures. The Handbook stated that each student was responsible for knowing the "current academic regulations, the general and specific requirements and the operational policies contained in the College Handbook, Division Catalog a n d all other official documents or announcements of the College." That section also provided that the Dean reserved the right to "revise or modify any of these policies at any time, if he feels it is in the best interest of a student or the College to do so."

Jallali failed five required first year courses, so his expected graduation date changed from May 2002, to May 2003. Given this number of failed courses, Jallali could not have graduated with his class in 2002.

Beginning in the 1999-2000 academic year, the Student Handbook changed the osteopathic program's graduation requirements to require students in the 1999 entering class to pass *both* Comlex Level I and II exams to obtain a degree. The applicable Student Handbook stated: "All students in the class of 2003 or thereafter are required to pass both the Comlex Level I examination and the Comlex Level II examination of the National Board of Osteopathic Medical Examiners in order to graduate."

In 2002, Nova notified Jallali that h e was required to satisfy all graduation requirements, including passing the Comlex Level I and II, within six years from matriculation.

Jallali failed the Comlex Level I exam five times. After the first two failures, Nova sent Jallali reminders that he was required to pass the Comlex Levels I and II exams within six years of matriculation.

Finally, in October 2004, Jallali passed the Comlex Level I exam on his sixth attempt. He took the Comlex Level II exam for the first time in January 2005 and failed.

In March 2005, Nova referred Jallali to the Student Progress Committee to consider dismissal for failure to complete graduation requirements within the prescribed time. The letter noted that "the College's graduation requirements as specified in the Student Handbook (June 2004) confirm that all students in the classes of 2003 or any following years

must pass both Comlex Level I and II no more than two years after completion of all coursework requirements." It further stated that "since the next offering of the Comlex Level II examination is not until August 2005, [Jallali would] not have sufficient time to complete this graduation requirement prior to the May 23, 2005 deadline."

Jallali responded that the requirements set forth in the 1998-99 Student Handbook applied to him, because he started the program in 1998. Under those standards, h e ha d satisfied the Comlex exam requirements—he had passed the Level I exam and had sat for the Level II exam.

The Student Progress Committee recommended that Jallali be given one more opportunity to pass the Level II exam by September 1, 2005 to avoid dismissal. Nova's Dean wrote to Jallali to inform him of this decision. The letter noted that even though Jallali had failed to satisfy the necessary exam requirements within six years of matriculation, he "was afforded the benefit of a [2004] handbook revision allowing [him] to extend the period for meeting [his] board examination requirements until May 2005 (two years after completing all of [his] courses on May 23, 2003)." The letter pointed out that even though Jallali's failure of the January 2005 exam meant he would not be able to comply with the May 23, 2005 deadline, Nova was still giving him "one more opportunity to take and pass" the Level II exam.

Jallali failed the Level II exam for a second time in August 2005. The Student Progress Committee

recommended Jallali's dismissal from the program. The Dean agreed. Nova's Appeal Board upheld Jallali's dismissal. Jallali failed the Level II exam for a third time after his dismissal.

Jallali filed suit against Nova for breach of an implied contract, arguing that the 1998-1999 Student Handbook established his graduation requirements. He contended that these degree requirements could not be changed by subsequent handbooks.

At trial, there was testimony concerning the Comlex test requirements.

Linda Machieri, of the American Osteopathic Association ("AOA"), stated that in addition to obtaining a D.O. degree, a doctor needed a license to practice medicine. In Florida, licensure requirements include passing the national board examinations: Comlex Levels I, II, and III.

Dr. John Thornburg, the Chairman of the Committee of the National Board of Osteopathic Medical Examiners, which administers the Comlex examinations to all prospective D.O. physicians nationwide, explained that the Comlex Level II is used "to determine minimal levels of competency in order to practice as a general practitioner of osteopathic medicine." He also explained that the national board believes that medical schools should not award a degree to a student who is unable to pass the Comlex Level II, because such a student would not be able to obtain a license or meet the minimum level of competency.

Thornburg explained that the passage-rate for first-time takers of Level II is between 88 and 91 percent. The passage-rate for second-time test takers is 60 to 80 percent. A very small number of test-takers, probably less than one percent, never pass. If a student had to take the test multiple times, "it would suggest that they have had considerable difficulty achieving that [minimum level of competency]." Thornburg reviewed Jallali's August 2005 scores and explained that Jallali received a "really low score" of 294, which is well under the minimum passing score of 400 on the Comlex Level II."

Dr. Conrad Miscowicz, the Director of the Department of Accreditation with the AOA, explained that the AOA is the accrediting agency for colleges of osteopathic medicine. In 2001, the AOA began the process of changing accreditation standards so that medical schools would require that students pass the Comlex Level II. Medical schools had to add passage of the Comlex Level II as a graduation requirement in order to maintain their accreditation.

Finally, Nova's Dean explained that Nova updated its graduation requirements in 1999 to include passing the Comlex Level II because (1) many residency programs required passage as a prerequisite to application; (2) Nova anticipated that the AOA would change its accreditation standards to impose this requirement; and (3) this would ensure that graduating students were competent to practice medicine.

The Dean pointed out that because Jallali failed several courses his first year and had to repeat them in 1999-2000, he could not graduate in 2002 and was subject to the revised graduation requirement of passing the Comlex Level II exam applicable to classes graduating in 2003 or later. According to the Dean, Jallali and four other students who matriculated with him in 1998, but did not graduate in 2002 due to academic failures, were required to pass the Comlex Level II examination in order to graduate. All students in the 2003 graduating class, and those graduating thereafter, were required to pass the Comlex Level II examination.

The central issue on appeal is whether the circuit court should have granted Nova's motion for directed verdict.

A directed verdict for the defense is proper when the evidence and all inferences from it, considered in the light most favorable to the plaintiff, would justify a finding for the defendant. *See, e.g., City of Lauderhill v. Rhames*, 864 So. 2d 432, 434 n.1 (Fla. 4th DCA 2003); *Knowles v. Hennelly*, 793 So. 2d 1063, 1065 (Fla. 4th DCA 2001). On appeal, a trial court's ruling o n a motion for directed verdict is reviewed d e novo. *Flagstar Cos., Inc. v. Cole-Ehlinger*, 909 So. 2d 320, 322 (Fla. 4th DCA 2005).

Nova's legal relationship with Jallali was "solely contractual in character, and there is an implied condition that the student knows and will conform to the rules and regulations of the institution." *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1924).

Under this contract implied in fact, the student "pays a fee for services" and the private university provides "an educational experience designed to lead to a...degree." *Gross v. Family Servs. Agency, Inc.*, 716 So. 2d 337, 339 (Fla. 4th DCA 1998). A private university "may set forth terms under which it will admit a n d subsequently graduate students who will subject themselves to the rules, regulations and regimen of the college." *Univ. of Miami v. Militana*, 184 So. 2d 701, 704 (Fla. 3d DCA 1966). "It is generally accepted that the terms and conditions for graduation are those offered by the publications of the college at the time of enrollment. As such, they have some of the characteristics of a contract between the parties, and are sometimes subject to civil remedies in courts of law." *Id.*; *see Sharick v. Se. Univ. of the Health Sciences, Inc.*, 780 So. 2d 136, 138 (Fla. 3d DCA 2000); *accord, Univ. of Miss. Med. Ctr. v. Hughes*, 765 So. 2d 528, 535 (Miss. 2000) (finding "student-university relationship is contractual in nature and that the terms of the contract may be derived from a student handbook, catalog, or other statement of university policy."). Implicit in the student's contract with a private university is the notion that "if the student complies with the terms prescribed by the university, the student will obtain a degree." *Sharick*, 780 So. 2d at 139.

Whether Nova was entitled to modify its graduation requirements after Jallali entered the program in 1998 is critical to this appeal. The 1998-99 Student Handbook, upon which Jallali relies, provided that the College could "revise or modify" its policies "at any time", making this a discretionary decision of the Dean, subject to the limitations of good faith. This flexibility is consistent with the great deference that

courts accord to private universities in setting degree requirements. *See Olsson v. Bd. of Higher Educ.*, 49 N.Y.2d 408, 413 (N.Y. 1980) (where the court wrote that "[i]n order for society to be able to have complete confidence in the credentials dispensed by academic institutions . . . the issuance of these credentials must be left to the sound judgment of professional educators").

The United States Supreme Court has written that "[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 n.11 (1985) (citations omitted). The decision of whether a student is qualified to be a physician is an academic judgment that "requires a n expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making." *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978).

Adhering to this deferential standard, we join those courts in holding that "implicit in the university's general contract with students is a right to change the university's academic degree requirements if such changes are *not* arbitrary or capricious." *See Univ. of Miss. Med. Ctr.*, 765 So. 2d at 535 (emphasis added); *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976); *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 577-78 (6th Cir. 1988) ("No record evidence exists that [the school] acted arbitrarily, capriciously or with malice."); *Nuttelman v. Case W. Reserve Univ.*, 560 F. Supp. 1, 3 (N.D. Ohio

1981), *aff'd*, 708 F.2d 726 (6th Cir. 1982); *see also John B. Stetson Univ.*, 102 So. at 640 (indicating that a private college may pass reasonable regulations, "unless such regulations or rules are unauthorized, against common right or palpably unreasonable"). A court will not interfere with a private university's enforcement of its regulations unless the university has acted arbitrarily a n d capriciously, in violation of a constitution or statute, or for fraudulent purposes. *See John B. Stetson Univ.*, 102 So. at 640; *Militana v. Univ. of Miami*, 236 So. 2d 162 (Fla. 3d DCA 1970).

Mahavongsanan presents a claim almost identical to Jallali's. *See Mahavongsanan*, 529 F.2d at 448. There, a student sought injunctive relief against a university, claiming a deprivation of her rights by the school's arbitrary and capricious refusal to grant her a master's degree in education. *Id.* at 440. One of the student's claims was for breach of contract. *Id.* The student had twice failed to pass a comprehensive examination required for graduation. *Id.* at 450. Just like Jallali, the student argued that the university breached its contract with her by requiring her to take the comprehensive examination to graduate, which was not a requirement when she enrolled. *Id.* The Fifth Circuit held that the student's contract claim was without merit "because of the wide latitude and discretion afforded by the courts to educational institutions in framing their academic degree requirements." *Mahavongsanan*, 529 F.2d at 450. The court explained:

> Implicit in the student's contract with the university upon matriculation is the student's agreement to comply with the university's

> rules and regulations, which the university is entitled to modify so as to properly exercise its educational responsibility. The appellees' claim of a binding, absolute unchangeable contract is particularly anomalous in the context of training professional teachers in post graduate level work.

529 F.2d at 450 (citations omitted). The Fifth Circuit also noted that the university was entitled to require the student to take the exam to grant her a degree as the decision was a reasonable academic regulation "within the expertise of the university's faculty," and the student received timely notice of the new requirement.[1] *Id.*

The Supreme Court of Mississippi reached the same conclusion as *Mahavongsanan* on similar facts. In *University of Mississippi Medical Center v. Hughes*, several medical students sued the medical school for injunctive relief when the university changed its degree requirements after the students had enrolled.

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[1] *Hammond v. Auburn Univ.*, 669 F. Supp. 1555 (M.D. Ala. 1987), followed *Mahavongsanan* in a case similar to this one. In *Hammond*, a student brought a breach of contract claim against the university when it changed the electrical engineering degree requirements two years into the student's coursework. Without finding that the student had a binding contract with the university, the court stated that the law "is clear regarding breach of contract claims similar to the plaintiff's herein. Implicit in a student's educational contract with the University is the duty of the student to comply with the University's rules and regulations which the University can modify 'so as to properly exercise its educational responsibilities.'" *Id.* (quoting *Mahavongsanan*, 529 F.2d at 450). The court also noted that the university specifically reserved the right to modify its graduation requirements.

765 So. 2d 528, 531 (Miss. 2000). The court concluded:

> [I]n keeping with the law of sister jurisdictions, that while the student-university relationship is contractual in nature, implicit in the university's general "contract" with its students is a right to change the university's academic degree requirements if such changes are not arbitrary or capricious. This conclusion is reached particularly in light of the great reluctance, expressed b y numerous courts, including the United States Supreme Court, to intervene in the academic context. A strict view of contract law-that it is a breach of contract for the University to modify its degree requirements in any instance after a student has enrolled-is rejected. Such a rule would interfere unnecessarily in the University's discretion to manage its academic affairs.

Id. at 535 (internal citations omitted).

Applying these standards, Nova was authorized to change its degree requirements after 1998 to require students to pass the Comlex Level II exam within six years of matriculation. The reasons for the change were to ensure competency to practice osteopathic medicine, to anticipate a change in accreditation requirements, and to comply with a prerequisite of many residency programs. Nova acted within its broad discretion when it exercised its academic judgment to modify the requirements for a D.O.

degree. Jallali received adequate notice that he would be required to take the Comlex Level II exam. Students who graduated in 2003 or later were required to pass the Level II exam to conform to rising national standards to obtain a D.O. degree. Neither the university's change in the degree requirement nor its application to Jallali was arbitrary and capricious, or done for a fraudulent purpose.

We reject Jallali's argument that he should be excused from showing that Nova acted arbitrarily and capriciously to prevail on his claim. He urges us to ignore the foregoing case law because it should not apply to a "modern day university," which is more of a "commercial" institution, in the "'business' of selling students degrees" for "cold cash." The rule we apply in this case has its genesis in the Supreme Court's 1924 decision in *John B. Stetson Univ.*, a case which we do not have the authority to overrule. *See Hoffman v. Jones*, 280 So. 2d 431, 440 (Fla. 1973).

For these reasons, we hold that the trial court erred in denying Nova's motion for directed verdict. We reverse the final judgment and remand for the entry of a judgment in favor of Nova Southeastern University.

STONE, J., and ROSENBERG, ROBIN, Associate Judge, concur.

* * *

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County;

Eli Breger, Judge; L.T. Case No. 05-9811 (11).

Scott Alan Mager and Gary S. Gaffney of The National Trial Group, LLC, Fort Lauderdale, and Stewart L. Karlin of Karlin Law Group, P.A., Fort Lauderdale, for appellant.

Nancy H. Henry, Cristina Alonso and Erin Kinney of Carlton Fields, P.A., Miami, for appellee.

Not final until disposition of timely filed motion for rehearing.

Appendix "B"

Order Denying Rehearing
and Rehearing En Banc
(October 27, 2008)

IN THE DISTRICT COURT OF APPEAL STATE OF FLORIDA
FOURTH DISTRICT
1525 PALM BEACH LAKES BLVD WEST PALM BEACH, FL 33401

October 27, 2008

CASE NO.: 4D07-2351
L.T. No.: 05-981111

DR MASSOOD JALLALI v. NOVA SOUTHEASTERN UNIVERSITY, INC.

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant/cross-appellee's motion filed October 15, 2008, for rehearing, certification and/or rehearing en banc is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Richard A. Beauchamp, Scott A. Mager, Stewart Lee Karlin, Cristina Alonso, Nancy Henry, Mark A. Hendricks, Erin Kinney

kb

Marilyn Beuttenmuller

MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

Appendix "C"

Order Declining to
Accept Review of Appellate Opinion
(April 1, 2009)

Supreme Court of Florida

WEDNESDAY, APRIL 1, 2009

CASE NO.: SC08-2308
Lower Tribunal No(s).: 4D07-2351

DR. MASSOOD JALLALI vs. NOVA SOUTHEASTERN UNIVERSITY, INC.

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

QUINCE, C.J., and PARIENTE, CANADY, POLSTON, and LABARGA, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

jn
Served:

STEWART LEE KARLIN NANCY H. HENRY
ERIN LYN KINNEY CRISTINA ALONSO
HON. MARILYN BEUTTENMULLER, CLERK
HON. HOWARD FORMAN, CLERK
HON. ELI BREGER, JUDGE